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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43443
Plaintiff-Respondent,)	
)	LATAH COUNTY NO. CR 1992-730
v.)	
)	
DOUGLAS RAYMOND COLVIN,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF LATAH**

HONORABLE JOHN R. STEGNER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Douglas Raymond Colvin appeals from the district court's order denying his motions to correct an illegal sentence, withdraw his guilty plea, take judicial notice, and appoint standby counsel. Mindful of the facts and relevant authority, Mr. Colvin asserts that the district court erred when it denied his motions.

Statement of the Facts and Course of Proceedings

In July of 1992, pursuant to a Rule 11 plea agreement, Mr. Colvin pleaded guilty to Murder in the Second Degree. (R., pp.31-35.) Subsequently, the district court imposed a life sentence, with 25 years fixed. (R., pp.49-51.) The following year, Mr. Colvin filed an Idaho Criminal Rule 35 motion requesting leniency, but the district court denied the motion. (R., pp.53-54, 71.) Mr. Colvin also filed a petition for post-conviction relief, but the petition was ultimately denied. (R., pp.137-38.)

In March of 2015, Mr. Colvin, acting *pro se*¹, filed a "Motion for Correction of an I.C.R. Rule 35(a) Illegal Sentence from the Face of the Record" (*hereinafter*, Rule 35 motion), along with a motion for appointment of standby counsel. (R., pp.81-87, 73-79.) In his Rule 35 motion, Mr. Colvin argued that his sentence was illegal because he was "not given the opportunity to present mitigating information or evidence" as required by law. (R., p.82.) Specifically, Mr. Colvin argued that the district court's invitation to speak was "so ambiguous as to have rendered my sentence illegal on the basis that I was not adequately offered the right to allocution" (R., p.82.) He asserted that this

¹ All of Mr. Colvin's subsequent motions described below were filed *pro se*.

was a violation of his constitutional rights and his rights under I.C.R. 33(a)(1) and I.C. § 19-2512. (R., pp.81-83.)

Subsequently, the State filed a response to Mr. Colvin's motion in which it argued that the sentence imposed in this case was not illegal from the face of the record, and a motion to challenge a sentence imposed in an illegal manner, brought under I.C.R. 35(b), had to have been filed within 120 days of the judgment of conviction. (R., pp.88-91.)

Mr. Colvin then filed an answer to the State's response. (R., pp.119-28.) He pointed out that the reason he requested the appointment of standby counsel was that he did not have adequate access to courts while incarcerated and this prevented him from filing a meaningful pleading. (R., pp.119-20.) He asserted that it was not clear to him why the State was distinguishing between Rule 35(a) and (b), but he was certain he was entitled to relief of some kind, "due to newly discovered fact predicates only recently coming to light." (R., p.120.)

Mr. Colvin also argued that his sentence was imposed in an illegal manner in violation of I.C. § 19-2510 and I.C. § 19-106 because the district court did not ask him personally if he had "legal cause to show why not to pronounce judgment." (R., pp.120-21, 124.) He argued that, if that question had been directed towards him and not his counsel, he would have exercised his rights under I.C. § 19-106(2). (R., pp.121, 124.) Mr. Colvin also asserted that the district court entered the judgment outside his view, and he was "not fully apprised that there was fraud and misleading information in the judgment until recently." (R., p.121.) Finally, Mr. Colvin argued that his counsel was

ineffective for failing to identify the district court's error of not allowing him to address the district court pursuant to I.C. § 19-2510 and I.C. § 19-106(2). (R., p.122.)

In April of 2015, Mr. Colvin, acting *pro se*, filed a "Motion for Relief." (R., pp.101-12.) In that motion, he argued that, pursuant to I.C.R. 33(c), he should be allowed to withdraw his guilty plea to "correct manifest injustice." (R., p.101.) Mr. Colvin made several arguments in this motion. First, he argued that — because part of the plea agreement included a waiver of his right to appeal — he was unable to get adequate records "needed for marshaling evidence and facts of actual innocence or ineffective counsel (where my claim challenges validity of plea or lack of knowing, intelligent, willing waiver.)" (R., p.101.)

Second, he argued that he was prejudiced by his trial counsel's deficient performance. (R., p.102.) Specifically, he said that his trial counsel misled him on "material elements of the case" and was unable to build a defense due to the fact that he was not paid enough and was therefore "forced to proceed without adequate witness interviews and investigations." (R., p.102.) In support of this, Mr. Colvin attached a letter he had written to the district court judge after his sentencing, in which he complained that his attorney had, among other things, not contacted witnesses, lied to him and his family, and recommended that he sign the plea agreement "because he thought that he couldn't build a defense for me." (R., pp.107-08.) He also said that he had only recently become aware of public defender underfunding, and asked the district court to take judicial notice of the Idaho Attorney General's evaluation of trial level indigent defense systems. (R., p.102.)

Third, Mr. Colvin again requested the appointment of standby counsel due to the “absence of an adequate law library and no person trained in the law.” (R., p.102.) Fourth, Mr. Colvin stated that a guilty plea did not foreclose a subsequent claim under 42 U.S.C. § 1983 “or related state actions.” (R., p.103.) He asked that the district court grant his motion for standby counsel to confer on these issues. (R., p.103.)

Fifth, Mr. Colvin argued that the plea agreement was breached when his attorney was unable to attend and advise him at the psychological evaluation. (R., p.103.) He said that the proceeding was therefore unconstitutional and resulted in manifest injustice. (R., p.103.) Finally, Mr. Colvin argued that he did not understand the plea agreement, and his counsel did not let him read the agreement prior to his plea of guilty. (R., p.103.) He argued that he was severely depressed and under duress at his hearings, and his counsel told him how to answer questions, and therefore, the contract was void. (R., p.104.)

The State subsequently filed an objection to Mr. Colvin’s motion for relief. (R., pp.113-14.) The State argued that Mr. Colvin’s motion was untimely, and that he had waived his right to appeal his sentence as part of the plea agreement. (R., pp.113-14.) Additionally, it argued that Mr. Colvin was raising an issue that could have been raised on direct appeal, or through post-conviction, and that Mr. Colvin did not provide a sufficient legal basis for the court to grant his motion. (R., p.114.)

Mr. Colvin then filed an answer to the State’s objection. (R., pp.132-35.) He argued that the State’s arguments were irrelevant because his motions were based on recently discovered facts. (R., p.133.) He argued that, “the judgment incorrectly states that the Court made 19-2510 statutory inquiry, when in fact it did not,” and, therefore,

the judgment was voidable, and he should be allowed to withdraw his guilty plea. (R., p.133.)

The district court denied Mr. Colvin's motions. (R., pp.137-57.) In regard to the Rule 35 motion, it clarified that an "illegal sentence" can be corrected at any time under I.C.R. 35(a), but noted that, under I.C.R. 35(b), if a sentence is "merely 'imposed in an illegal manner,' the motion must be filed 'within 120 days after the filing of the judgment of conviction'" or the court will not have jurisdiction to rule on the motion. (R., p.140.) The district court found that Mr. Colvin's motion was a challenge to a sentence imposed in an illegal manner as opposed to an illegal sentence. (R., p.141.) It said it could "find no ground for relief under I.C.R. 35(a)" and did not have jurisdiction to "consider any relief based on I.C.R. 35(b)." (R., p.141.) It said that it could make the distinction because: "(1) a factual inquiry is required, which distinguishes the two kinds of Rule 35 motions; (2) the claimed errors are not apparent from the face of the record; and (3) the challenged errors are procedural, and thus go to the manner in which the sentence was imposed, rather than the legality or illegality of the sentence itself." (R., p.141.) It then explained its reasoning for those three findings and ultimately held that, because the motion fell under I.C.R. 35(b), it was untimely, and it had no jurisdiction to consider it. (R., pp.141-45.)

The district court went on to hold that, "[e]ven if Colvin's challenge goes to an alleged illegality of the sentence itself . . . the record does not establish any error." (R., p.145.) It said that Mr. Colvin "was given the opportunity to allocute and took that opportunity to speak to the Court." (R., p.145.) With respect to Mr. Colvin's argument that the sentencing court violated his rights under I.C. § 19-2510 and I.C. § 19-106, the

district court said that the transcript showed that the sentencing court “asked the question: ‘Does the defendant have any lawful cause to show why judgment should not be pronounced against him at this time?’ to which Colvin’s attorney, Mr. Henegan, replied, ‘No, your honor.’” (R., p.147.) The district court found that this argument failed because Mr. Colvin did not cite to authority holding it was inappropriate to ask his attorney this question, and I.C. § 19-106 did not give him the right to be represented by an attorney and to represent himself contemporaneously. (R., p.147.)

In regard to Mr. Colvin’s argument that he was not given an opportunity to present mitigating evidence, the district court noted that Mr. Colvin declined an opportunity to take the stand and present mitigating evidence. (R., p.147.) It also said that the sentencing court told Mr. Colvin that he had a right to make a personal statement prior to sentencing and invited him to do so. (R., p.148.) It said that Mr. Colvin “then made a statement.” (R., p.148.) As such, it held that “Colvin has failed to establish any error whatsoever in his sentencing.” (R., p.148.)

With respect to Mr. Colvin’s motion to withdraw his guilty plea, the district court broke down the arguments into three categories: ineffective assistance of counsel, invalid or breached plea agreement, and a lack of understanding of the plea agreement. (R., p.149.) It held that Mr. Colvin was barred, under the doctrine of *res judicata*, from raising a claim of ineffective assistance of counsel because he had made the same claim previously on post-conviction. (R., pp.150-51.) It held that Mr. Colvin did not have a right to have counsel present during his psychological evaluation. (R., pp.151-52.) And it held that Mr. Colvin’s “claimed misunderstanding of the plea agreement cannot serve as a basis to invalidate his guilty plea.” (R., pp.152-54.)

The district court also denied Mr. Colvin's motion to take judicial notice of an evaluation by the Idaho Attorney General's Office because Mr. Colvin did not provide the evaluation to the district court, and "his request was about public defenders between 2004 and 2014, and does not have anything to do with his case, that was resolved by 1993."² (R., p.155.)

The district court also denied Mr. Colvin's motion for appointment of standby counsel. (R., pp.155-56.) It said that, because Mr. Colvin's motions lacked merit, an attorney would not assist him in bringing the motions. (R., p.155.) In regard to Mr. Colvin's request for standby counsel for the purpose of potentially pursuing a civil action, the district court denied that motion as well. (R., pp.155-56.) It stated that, "public defenders are not available in bringing these kinds of civil actions, as there is no constitutional right to representation in a civil action against the government." (R., p.155.)

Thereafter, on July 8, 2015, Mr. Colvin filed a "Notice of Error and Objection to Second Judicial District, Latah County Judge John R. Stegner's June 9, 2015 Orders." (R., pp.159-60.) In the notice, he asserted that the district court abused its discretion when it failed to "grant some form of legal assistance or adequate access to a law library." (R., p.159.) He also asserted that the district court erred when it held that all of his ineffective assistance of counsel claims should have been raised in the original post-conviction proceeding. (R., p.160.) He then asked for the appointment of counsel to aid him in the drafting of a Notice of Appeal. (R., p.160.) On July 9, 2015, the district court

² Mr. Colvin is not challenging the district court's denial of his motion to take judicial notice.

appointed counsel to assist Mr. Colvin in bringing an appeal. (R., p.162.) However, on July 17, 2015, Mr. Colvin, acting *pro se*, filed a Notice of Appeal that was timely from the district court's order denying his various motions. (R., pp.164-68.)

ISSUES

1. Did the district court err when it denied Mr. Colvin's I.C.R. 35 motion to correct an illegal sentence?
2. Did the district court abuse its discretion when it denied Mr. Colvin's motion to withdraw his guilty plea?
3. Did the district court abuse its discretion when it denied Mr. Colvin's motion for appointment of standby counsel?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Colvin's Idaho Criminal Rule 35 Motion To Correct An Illegal Sentence

Under Idaho Criminal Rule 35, a district court “may correct a sentence that is illegal from the face of the record at any time.” I.C.R. 35(a). “Generally, whether a sentence is illegal or whether it was imposed in an illegal manner is a question of law over which” appellate courts exercise free review. *State v. Farwell*, 144 Idaho 732, 735 (2007) The Idaho Supreme Court has held “the term ‘illegal sentence’ under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing.” *State v. Clements*, 148 Idaho 82, 86 (2009). More recently, the Idaho Supreme Court clarified that “Rule 35’s purpose is to allow courts to correct illegal sentences, *not* to reexamine errors occurring at trial or before the imposition of the sentence.” *State v. Wolfe*, 158 Idaho 55, 65 (2015) (emphasis in original). In contrast, Idaho Criminal Rule 35(b) provides that the court can hear a motion for leniency or a motion to correct a sentence imposed in an illegal manner if it is filed within 120 days of the order appealed from. I.C.R. 35(b).

I.C.R. 33(a)(1) requires that, prior to sentencing, the trial court “shall address the defendant personally, to ask if the defendant wishes to make a statement and to present any information in mitigation of punishment.” I.C. § 19-2510 mandates that, prior to sentencing, the defendant “must be asked whether he has any legal cause to show why judgment should not be pronounced against him.” I.C. § 19-106(2) states

that a defendant in a criminal action is entitled to “appear and defend in person and with counsel.”

Mindful of the above precedent regarding the scope of Rule 35(a) and the fact that he did speak at his sentencing hearing, Mr. Colvin argues the district court erred when it denied his Rule 35 motion. He argues that his sentence was illegal from the face of the record because the sentencing court’s invitation for him to speak prior to his sentencing was so ambiguous — with respect his right to present mitigating information — that he was denied the opportunity to allocute in accordance with I.C.R. 33(a)(1). The sentencing court said, “Mr. Colvin, under the laws of this State you as a Defendant at the time of sentencing have the right to make a personal statement to the Court. If you wish to do so I would be pleased to hear from you. If you don’t wish to make a statement just advise me that’s your decision.” (10/26/92 Tr., p.83, Ls.5-10.) Mr. Colvin then addressed the district court. (See 10/26/92 Tr., p.83, L.11 – p.84, L.8.) He asserts, however, that because of the district court’s ambiguous statement, he did not know that he could speak in mitigation about, among other things, his attempts to seek treatment and his mental health at the time of the offense. (See R., p.83.)

Additionally, mindful of the fact that he did not cite to authority to support his argument that his attorney should not have answered when he when the district court asked whether there was any reason why judgment should not be pronounced, Mr. Colvin asserts that this was a violation of his rights under I.C. § 19-2510 and I.C. § 19-106. (10/26/92 Tr., p.92, Ls.19-22; R., p.121.)

II.

The District Court Abused Its Discretion When It Denied Mr. Colvin's Motion To Withdraw His Guilty Plea

Mr. Colvin asserts that his guilty plea was not knowing, intelligent, and voluntary because his counsel was ineffective, the plea agreement was breached when counsel did not appear at his psychological evaluation, and he had not read, nor did he understand, the plea agreement before the change of plea hearing. An appellate court reviews a district court's decision to deny a motion to withdraw a plea for an abuse of discretion. *State v. Hayes*, 138 Idaho 761, 765 (Ct. App. 2003). "A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea." I.C.R. 33(c). A showing of manifest injustice is necessary in order to withdraw a guilty plea after sentencing." *State v. Flowers*, 150 Idaho 568, 571 (2011).

"Because a guilty plea by a criminal defendant waives certain constitutional rights, including the privilege against self-incrimination, the right to a jury trial, and the right of confrontation, a guilty plea will only be upheld if the entire record demonstrates that the waiver was made voluntarily, knowingly, and intelligently." *State v. Heredia*, 144 Idaho 95, 97 (2007). "Manifest injustice occurs if this standard requiring a voluntary, knowing, and intelligent waiver is not met." *Id.*

A court determines whether a plea is entered voluntarily and knowingly through a three-part inquiry involving:

- (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced;
- (2) whether the defendant knowingly and intelligently waived his rights to a jury trial, to

confront his accusers, and to refrain from incriminating himself; and (3) whether the defendant understood the consequences of pleading guilty.

State v. Dopp, 124 Idaho 481, 484 (1993). “On appeal, Idaho law requires that voluntariness of the guilty plea and waiver must be reasonably inferred from the record as a whole.” *Id.* A district court’s finding that a plea is voluntary, knowing, and intelligent is a question of fact which will not be disturbed on appeal if it is supported by substantial evidence. *Huck v. State*, 124 Idaho 155, 161 (Ct. App. 1993) citing *Odom v. State*, 121 Idaho 625, 628 (Ct. App. 1992).

The Idaho Supreme Court has held that “[a]bsent a statute or rule extending its jurisdiction, the trial court’s jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by expiration of the time for appeal or affirmance of the judgment on appeal.” *State v. Jakoski*, 139 Idaho 352, 355 (2003) The Court went on to hold that “Rule 33(c) of the Idaho Criminal Rules does not include any provision extending the jurisdiction of the trial court for the purpose of hearing a motion to withdraw a guilty plea.” *Id.* Thus, a trial court loses jurisdiction to rule on a motion to withdraw a guilty plea once the judgment becomes final.

In this case, mindful of *Jakoski*, and the fact that the judgment in his case became final in December of 1992,³ Mr. Colvin argues that the district court here had jurisdiction to consider his motion to withdraw his guilty plea. Therefore, he asserts that he was not barred from raising the issue of ineffective assistance of counsel because he was making the argument based on newly discovered information that his public

³ See R., pp.49-51.

defender, due to being underpaid, could not pursue adequate witness interviews and investigations. (R., pp.102-03.)

Additionally, mindful that Mr. Colvin did not have a recognized constitutional right to the presence of counsel at his psychological evaluation⁴ — which was ordered as part of the plea agreement — he argues that, because his attorney was not present, the plea agreement was invalid because his right to counsel was violated. As such, the plea agreement resulted in manifest injustice.

Finally, mindful that the minutes from the change of plea hearing indicate that the district court found that Mr. Colvin had freely, knowingly, and intelligently waived his rights to a trial and entered the guilty plea with a full understanding of the consequences, Mr. Colvin also asserts that his guilty plea was not knowing, intelligent, and voluntary because he did not understand the plea agreement, and his counsel did not let him see the agreement prior to his plea. (R., p.35.) Therefore, he asserts that the district court's finding that he did not understand the plea agreement was not supported by substantial evidence.

III.

The District Court Abused Its Discretion When It Denied Mr. Colvin's Motion For Appointment Of Standby Counsel

"The Sixth Amendment guarantees a criminal defendant the right to counsel during all 'critical stages' of the adversarial proceedings against him. *United States v. Wade*, 388 U.S. 218, 224 (1967). An indigent person is entitled to be represented by counsel in any "post-commitment proceeding . . . unless the court in which the

⁴ See *Estrada v. State*, 143 Idaho 558, 562 (2006).

proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.” I.C. § 19-852(2)(c). As such, a defendant may be denied the appointment of counsel to assist in pursuing post-commitment motions if the trial court finds the motions to be frivolous. See e.g. *State v. Wade*, 125 Idaho 522, 523-24 (Ct. App. 1994). Additionally, the appointment of standby counsel has been held to be discretionary in Idaho. *State v. Averett*, 142 Idaho 879, 886 (Ct. App. 2006). Thus, appellate courts review a district court’s decision to appoint standby counsel for an abuse of discretion. *Id.*

In this case, the district court denied Mr. Colvin’s motion for the appointment of standby counsel based on its finding that an attorney would not assist him to pursue his post-commitment motions because they lacked merit. Mindful of the above authority and the nature of his motions, Mr. Colvin asserts that the district court abused its discretion when it denied his request for the appointment of standby counsel because his motions were not frivolous.

CONCLUSION

Mr. Colvin respectfully requests that this Court vacate the district court’s order denying defendant’s motions to correct sentence, withdraw guilty plea, take judicial notice, and appoint standby counsel and remand the case for further proceedings.

DATED this 6th day of June, 2016.

_____/s/_____
REED P. ANDERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of June, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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JOHN R STEGNER
DISTRICT COURT JUDGE
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_____/s/_____
EVAN A. SMITH
Administrative Assistant

RPA/eas